No. 48927-9-II

DIVISION II OF THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

RICHARD BOYD,

Appellant,

v.

CITY OF OLYMPIA, ET AL,

Respondent,

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The Board of Industrial Insurance Appeals ("Board") and the Superior Court had an opportunity – and obligation – to construe the Industrial Insurance Act liberally, with all doubts resolved in favor of injured firefighter, Richard Boyd. This is a long standing mandate of our State Supreme Court. However, the Board and the Superior Court *narrowly construed* the Industrial Insurance Act – and chose to resolve doubt in favor of the self-insured-employer ("SIE"), City of Olympia, rather than the injured worker.

Firefighter Richard Boyd's treating physician, Dr. Roa, submitted a protest medical record to the Third Party Administrator who was handling Mr. Boyd's industrial injury claim. This protest record constituted a protest of a Department order of February 18, 2014 that ordered his condition was "stable."

This protest record was reasonably calculated to put the SIE on notice that Mr. Boyd was not "stable", and that action was requested that was inconsistent with the Department's order.

Dr. Roa's February 13, 2014 protest record automatically operates to set aside the Department's order affirming claim closure until the Department officially acts to issue a final decision by a further appealable order. Mr.

Boyd's Notice of Appeal to the Board, therefore, was not untimely and the matter is still before the Department. Nonetheless, the Board incorrectly found otherwise and the Superior Court affirmed the Board's Decision and Order. Mr. Boyd appeals to this Court.

Appellant Boyd respectfully submits the following opening brief.

II. ASSIGNMENTS OF ERROR

1. The Board of Industrial Insurance Appeals ("Board") and Superior Court committed reversible error when the Board granted the Self Insured Employer's ("SIE") Motion for Summary Judgment, denied Mr. Boyd's Motion for Summary Judgment and the Superior Court affirmed the Board's Decision and Order.

Issue: Does Dr. Roa's February 13, 2014 protest record, which he submitted to the SIE Third Party Administrator within sixty (60) days of the Department's February 18, 2014, order constitute a protest of that order?

Issue: Should the SIE be judicially estopped from challenging that Dr. Roa's February 13, 2014 was a protest and from challenging Dr. Roa's lawful authority to protest a Department order?

Issue: Because the Dr. Roa February 13, 2014 medical record was a timely protest of the Department's February 18, 2014 Order, should the Department have held its February 13, 2014 Order in abeyance, does the Board lack jurisdiction, and was the notice of appeal deadline set forth in RCW 51.52.050 applied to Mr. Boyd in error?

2. The Board committed reversible error when the Board excluded various treatment records provided to the Board and various documents in the Department and SIE file, and the Superior Court committed reversible error when it affirmed the Board's Decision and Order.

Issue: Should the Board and Superior Court have considered the documentary evidence presented to the Board by Mr. Boyd in conjunction with Mr. Boyd's Petition for Review.

Issue: Should the Board and Superior Court have considered the documentary evidence in the Department's file, when Mr. Boyd's response to the SIE's motion for summary judgment indicated that the evidence relied upon were the records of the SIE and Department?

III. STATEMENT OF THE CASE

Richard Boyd filed an application for benefits on November, 2009 -- for his October 22, 2009 industrial injury. CABR 81. On November 25, 2009 the Department of Labor and Industries allowed Richard Boyd's claim and further indicated his entitlement to medical treatment and other benefits as appropriate under the Industrial Insurance Act. CABR 81.

Richard Boyd saw Dr. Green on September 24, 2013 and was referred for left hip treatment, including ultrasound guided injection. CABR 85. Prior to this visit, but after his claim was opened, Mr. Boyd was seen on several occasions by providers relating to this left hip. Despite being provided with various treatment records relating to Mr. Boyd's left hip, the Board wrongfully excluded those records. *See section F below.*

Richard Boyd's claim was closed on October 10, 2013. CABR 82. Through their counsel, the SIE submitted to the Claims Adjudicator Trisha Green, a September 24, 2013 **chart note** by one of Mr. Boyd's treating doctors, **Dr. Green**. CABR 84-85 A January 2, 2014 cover letter by SIE counsel that accompanied the Dr. Green chart note stated in pertinent part:

> "Please see the enclosed chart note by Dr. Green regarding Claimant's hip in which **Dr. Green recommends another**

> **IME and further treatment.** The self-insured employer received this chart note on October 31, 2013, which was within sixty days of the October 10, 2013 closing order. **I understand this chart note will likely be construed as a protest to the closing order**. Please contact me if you have any questions." [bold emphasis added]. CABR 84.

The Jurisdictional History at page 2 has an entry dated January 2, 2014 which states "Employer (ST Wallace, Jr. - Atty) Indicates that the self-insured employer received the enclosed chart note by Dr. Green on 10/31/13 , and that the chart note will likely be construed as a protest to the closing order. (Faxed)." CABR 82.

In a subsequent letter from the SIE counsel to Claims Adjudicator Trisha Green and dated January 10, 2014, SIE counsel stated, "Claimant's hip surgeon, **Dr. Green, recently authored a chart note** which recommended another IME to address discrepancies in medical opinions for this claim. **That chart note served as a protest** to the October 10, 2012 closing order." [bold emphasis added]. CABR 87.

On January 13, 2014 the Self-Insured Employer entered a Protest and Request for Reconsideration to the closing order. CABR 82 & 87. On January 27, 2014, the Department ordered that the October 10, 2013 order is reversed, that Mr Boyd's claim is closed stating that his "covered medical condition/s is stable." CABR 82. Mr. Boyd was directed top ay the SIE for an overpayment of permanent partial disability. Richard Boyd's claim was

closed on January 27, 2014. CABR 82. The Department order of January 27, 2014 was affirmed on February 18, 2014. CABR 82.

On February 24, 2014, Third Party Administrator Carrie Fleishmann received a chart note from Dr. Roa. CABR 353. This is within sixty days of the February 18, 2014 Department closure order.

The Dr. Roa protest record provided a history of present injury, which clearly evidences that Mr. Boyd's condition relates to his left hip and was not "stable". CABR 589 & 111. In addition to the HPI, which shows his condition is **not stable**, the record indicates that Mr. Boyd underwent a hip injection at this visit. More specifically, he received an injection into the trochanteric bursa. CABR 590 & 112. Moreover, the record has a section for the assessment and plan, and in this section it **directs Mr. Boyd to take further action**, that is, to continue home PT and to **follow up in four to six weeks** to consider psoas vsintra-articular injection if he is not improving. *Id.*

This protest record specifically identifies Mr. Boyd's chief complaint: "CC: **Ongoing** L hip, referral by Dr. Green".[bold emphasis added]. CABR 588 & 110. After where the record indicates the date of the visit, it states: "**Occupational** Health." [bold emphasis added]. CABR 588 & 110.

Not only did the claims manager Fleishmann receive Dr. Roa's chart note, but she received his bill too. The SIE has admitted that on March 28,

2014, claims manager Fleishmann wrote a letter to Dr. Roa stating they received his chart note *and bill* after the February 18, 2014 closing order was issued. CABR 602.

At the March 11, 2016 Superior Court hearing, the Court stated: "So there is no dispute here that was a written document **submitted within the time allowed**." VRP 69.

The February 18, 2014 Department order should have automatically been held in abeyance by virtue of the Dr. Roa protest record.

On October 20, 2014, Richard Boyd filed an appeal to the Board of Industrial Insurance Appeals, wherein the relief requested section stated in part: "Claimant respectfully requests that the Board place the Department order of February 18, 2014 in abeyance based upon the fact Firefighter Boyd was still treating for his hip condition; an allowed condition on this claim. The self-insured employer received a protest to the Department order of 2/18/2014, which affirmed the Department order dated 1/27/2014 that closed Firefighter Boyd's claim from Dr. Roa's office on or about 2/23/2014. The self-insured employer was obligated to place the 2/18/2014 Department order in abeyance until a further determination could be made, and failed to do so." The Notice of Appeal is found at CABR 209-221.

The SIE and Mr. Boyd filed motions for summary judgment. CABR

339-350 and 317-324. The Board found that it had jurisdiction, that Mr Boyd did not file a written request for reconsideration of the Department's February 18, 2014 order with the Department within the time limitation allowed by RCW 51.52.050, Dr. Roa's chart note did not put the City of Olympia or the Department on reasonable notice that closure of Mr. Boyd's claim was being challenged and that Mr. Boyd did not file an appeal of the Department's February 18, 2014 order within 60 days of the date when it was communicated to him and that the pleadings and evidence submitted by the parties demonstrate that there was no genuine issue as to any material fact. CABR 6. The Board granted the SIE's motion and denied Mr. Boyd's motion. CABR 7.

Appellant Richard Boyd then filed a Notice of Appeal to the Thurston County Superior Court. CP 3-5. Thurston County Superior Court Judge Mary Sue Wilson issued an Order Affirming Decision and Order of the Board of Industrial Insurance Appeals on March 11, 2016, after oral argument by the parties. CP 47-49. Appellant Richard Boyd appealed to this Court. CP 50–52.

IV. ARGUMENT

A. Standard of review.

1. Superior Court

In the present case, the Board granted the SIE's motion for summary judgment and denied Mr. Boyd's Motion for Summary Judgment. The Superior Court reviewed a Board Decision and Order. "Upon appeal to superior court, the standard of review of the Board's findings of fact and conclusions of law is de novo." *Dep't of Labor & Indus. of State of Wash. v. Fankhauser*, 121 Wash. 2d 304, 308, 849 P.2d 1209, (1993). "A superior court may grant summary judgment only if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c)." *Id.* "Likewise, on appeal of a summary judgment order where no facts are in dispute and the only issue is a question of law, the standard of review is de novo." *Id.*

2. Appellate Court

> "In reviewing an order of summary judgment, "this court engages in the same inquiry as the trial court." A trial court may grant summary judgment only "if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law."' *Cowlitz Stud Co. v. Clevenger*, 157 Wash. 2d 569, 573, 141 P.3d 1, (2006). [Internal Citations omitted].

"In reviewing a summary judgment, "all facts and reasonable inferences are considered in a light most favorable to the nonmoving party, while all questions of law are reviewed de novo."' *Id.* [Internal Citation omitted]."We review the findings of the superior court's decision *de novo* to

determine whether substantial evidence supports them and whether its conclusions of law flow from the findings." *Arriaga v. Dep't of Labor & Indus.*, 183 Wash. App. 817, 822–23, 335 P.3d 977 (2014), review denied, 182 Wash. 2d 1012, 343 P.3d 760 (2015).

"The Board's decision is prima facie correct under RCW 51.52.115, and a party attacking the decision must support its challenge by a preponderance of the evidence." *Ruse v. Dep't of Labor & Indus.*, 138 Wash. 2d 1, 5, 977 P.2d 570 (1999).

B. The purpose of the Industrial Insurance Act is remedial in nature and shall be liberally construed in favor of the injured worker.

The issue is whether the Department's February 18, 2014 closing order was met with a timely protest. Aside from this issue, and to avoid a future estoppel argument by the SIE, Mr. Boyd hereby asserts and preserves his right to a jury on all other issues in his claim (e.g. pension).

The statute providing the injured worker with an avenue to have a Department order reconsidered – RCW 51.52.050 – is not restrictive or otherwise constricted by narrow statutory language.

RCW 51.52.050 provides that whenever the department has taken any action or made any decision relating to any phase of the administration of this title the worker, beneficiary, employer, or other person aggrieved thereby may request reconsideration of the department. *See RCW 51.52.050(2)(a).*

The February 13, 2014 Dr. Roa protest record indicated: (a) That the 2/13/14 office visit was **Occupational** Health; (b) that the chief complaint was "**Ongoing L hip**, referral by Dr. Green"; (c) that Mr. Boyd was presenting for **follow up of left hip pain**; (d) that Mr. Boyd had arthroscopic labraldebridement, in early 2012, and last met Dr. Roa for a diagnostic hip injection, and that he did get several months of benefit from the surgery but that **the** pain has since returned; (e) that at this February 13, 2014 visit, Mr Boyd received a hip injection; (f) that Dr. Roa directed Mr. Boyd to continue home exercise physical therapy and to follow up in four to six weeks to consider psoas vsintra-articular injection if he is not improving. CABR 588-592; 110-114. Moreover, after the Department issued its order affirming closure of Mr. Boyd's claim, Dr. Roa sent this protest record *to the Third Part Claims Administrator* who was handling Mr. Boyd's industrial injury claim. CABR 6.

This protest record indicated that Mr. Boyd had ongoing left hip pain, received additional treatment, was directed to continue physical therapy and to even follow up to consider another injection if his pain did not improve.

This record was reasonably calculated to put the SIE on notice that Mr. Boyd was not "stable", and that action was requested that was inconsistent with the Department's order. The Department's February 18,

2014 order affirmed a January 27, 2014 order that Mr. Boyd's covered medical condition was "stable." CABR 82. However, Mr. Boyd's left hip was not "stable" – as is evident by the Dr. Roa protest record, which Dr. Roa sent to the Third Party Claims Administrator *after the February 18, 2014 claim-closure*. CABR 6.

The Board and Superior Court had an opportunity – and obligation – to construe the Industrial Insurance Act liberally, with all doubts resolved in favor of Mr. Boyd. This is a long standing mandate of our State Supreme Court.

Nonetheless, the Board found that Dr. Roa's February 13, 2014 protest record did not contain protest language and did not put the SIE or the Department "on reasonable notice that closure of Mr. Boyd's claim was being challenged.". CABR 6. The Superior Court affirmed the Board's Decision and Order.

The Board and the Superior Court *narrowly construed* the Industrial Insurance Act – and chose to resolve doubt in favor of the SIE – rather than the injured worker.

Our State Supreme Court has held:

> "The legislature has instructed us that the act "**shall be liberally construed** for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment."

> RCW 51.12.010. To accomplish the legislative objective, our " 'guiding principle in construing provisions of the Industrial Insurance Act is that **the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.**' " *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 811, 16 P.3d 583 (2001) (quoting *Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 470, 745 P.2d 1295 (1987))." [bold emphasis added].

Michaels v. CH2M Hill, Inc., 171 Wash. 2d 587, 598, 257 P.3d 532 (2011).

RCW 51.04.010 provides in part that:

> "The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and **sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided** regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided." [bold emphasis added].

C. The February 13, 2014 Dr. Roa medical record was a protest.

Upon receipt of a closing order by the Department, a party aggrieved by the closure order may appeal the order to the Board, or seek reconsideration by the Department. These are two distinct actions. *See RCW*

51.52.050(2)(a) and (b); *see also Shafer v. Dep't of Labor & Indust.*,166 Wash.2d 710, 721, 213 P.3d 591 (2009), as corrected (October 30, 2009) ("A central purpose of the notice requirement is to allow a party aggrieved by the closure order to seek reconsideration by the Department or to appeal the order to the Board.") .

The time within which to file the request for reconsideration or note of appeal is sixty (60) days from the date the Department order is communicated. *See RCW 51.52.050.*

In the present case, the Department order at issue is dated February 18, 2014. Third Party Administrator Carrie Fleishmann received the Dr. Roa *protest record and bill* on February 24, 2014. CABR 353. This is within sixty days of the February 18, 2014 Department closure order. In fact, the SIE has admitted that on March 28, 2014, claims manager Fleishmann wrote a letter to Dr. Roa stating they received his bill and chart note after the February 18, 2014 closing order was issued. CABR 602. There was timely receipt of Dr. Roa's February 13, 2014 protest record and his bill.

At the March 11, 2016 Superior Court hearing, the Court stated: "So there is no dispute here that was a written document **submitted within the time allowed**." VRP 69.

The Board's Proposed Decision and Order and the Superior Court's

order affirming the Board's decision, did **not** find that Dr. Roa lacked authority to protest the Department order.

Dr. Roa has the lawful authority to bring a request for reconsideration of a Department's closure order. RCW 51.52.050(2)(a) allows a request for reconsideration of any action or decision of the Department related to any phase of the administration of Title 51 to be made by the "worker, beneficiary, employer, or other person aggrieved thereby". *RCW 51.52.050(2)(a).* RCW 51.52.135(b)(i) states in part, "If upon reconsideration requested by a worker **or medical provider**, . . ." [bold emphasis added]. Washington Administrative Code allows an attending doctor to request reconsideration on a prematurely closed claim or a claim that was closed in error. WAC 296-20-09701 **Request for reconsideration**, provides:

> "On occasion, a claim may be closed prematurely or in error or other adjudication action may be taken, which may seem inappropriate to the doctor or injured worker. When this occurs the **attending doctor** should submit immediately in writing his request for reconsideration . . ." [bold emphasis added].

The Board, in its significant decision of *In Re: Harry D. Pittis, BIIA Dec., 88 3651 (1989)* made it clear that WAC 296-20-09701 was intended as a delegation of authority by the Department to self-insured employers to receive, on behalf of the Department, attending doctors' requests for

reconsideration based on medical reasons.

> "An examination of WAC 296-20-09701 clearly reveals that it was intended as a delegation of authority by the Department to **self insured employers to receive, on behalf of tee Department, attending doctors' requests for reconsideration** based on medical reasons. Since the delegation was created through the rule-making process, all interested parties and those whose rights may be affected were put on notice of the **Department's intent to essentially make self-insured employers the Department's agent for receipt of requests for reconsideration** made by attending physicians for medical reasons, in self-insured claims." [bold emphasis added]. *In Re: Harry D. Pittis, BIIA number, 883651 (1989).*

An "attending doctor" for purposes of WAC 296-20-09701 means: "a person licensed to independently practice one or more of the following professions: Medicine and surgery; osteopathic medicine and surgery; chiropractic; naturopathic physician; podiatry; dentistry; optometry." *See WAC 296-20-01002* ***Definitions***. Moreover, this definition also states that: "An attending doctor is a treating doctor." *Id.*

Dr. Roa, a medical doctor providing treatment to Mr. Boyd is an attending doctor.

Moreover, as a treating doctor who seeks compensation for his professional medical services, Dr. Roa is a person "aggrieved" by the Department's February 18, 2014 Order. That order affirmed the January 27, 2014 order, which ordered that Mr. Boyd's covered medical condition was

"stable." CABR 82. The Department did not pay Dr. Roa for his February 13, 2014 injection of Mr. Boyd. CABR 346. Dr. Roa is aggrieved by the order.

The Board found, incorrectly, that Dr. Roa's chart note did not put the SIE or the Department "on reasonable notice that closure of Mr. Boyd's claim was being challenged." and that it "did not contain any protest language". CABR 6.

However, the Board's significant decision of *In Re: Mike Lambert* is on point here. In that case, the issue was whether a letter from the claimant's attorney, received by the Department, constituted a timely protest of a Department order. *In Re: Mike Lambert, BIIA No. 91 0107 (January, 1991).* In *In Re: Mike Lambert*, the Board acknowledged that the attorney's letter (a) did not use the word "protest", (b) did not use the words "request for reconsideration", and (c) did not specifically refer to the Department's September 7, 1990 order. *Id.*

However, the Board stated in the *In Re: Mike Lambert* significant decision: "On the other hand, we have never imposed any strict requirements on what may constitute a "protest" or "request for reconsideration." See, e.g., In re Charles Weighall, BIIA Dec. 29,836 (1970) (Application to reopen claim construed as protest of order closing claim)." *Id.* The Board stated the

rule that:

> "It is sufficient if the Department receives a written document, filed within the time allowed by law, which is **reasonably calculated to put the Department on notice that the party submitting the document is requesting action inconsistent with the decision of the Department."** [bold emphasis added]. *Id.*

"The BIIA publishes its significant decisions and makes them available to the public. RCW 51.52.160. These decisions are nonbinding, but persuasive authority for this court. *See Weyerhaeuser Co. v. Tri,* 117 Wash.2d 128, 138, 814 P.2d 629 (1991)." *O'Keefe v. State, Dep't of Labor & Indus.,* 126 Wash. App. 760, 766, 109 P.3d 484 (2005).

In the present case, the February 18, 2014 Department order affirmed the January 27, 2014 order. The January 27, 2014 order indicated claim-closure on the basis that the covered medical condition(s) is **stable**. CABR 82.

Review of Dr. Roa's protest record sent to the Third Party Administrator was reasonably calculated to put the SIE on notice that action was requested that was inconsistent with the Department order that deemed Mr. Boyd "stable."

The Dr. Roa protest record provided a history of present injury, which clearly evidences that Mr. Boyd's condition relates to his left hip and is not a "stable" condition:

> "Richard Lee Boyd is a 63 year old male presenting today for f/u L hip pain. He had arthroscopic labraldebridement in early 2012, and last met me for a diagnostic hip injection. He did get several months of benefit from the surgery, but the pain has since returned, maybe more severe than before. His history is complicated somewhat by back pain and suspected lumbar radiculopathy, affecting the calf, causing atrophy, for which he's seen Dr. Michael Lee. Richard reports pain along the anterolaterl hip, particularly with sleeping at night, which causes pain to linger trhough [sic] the night, challenging his sleep. He has some added lateral groin pain, and initially Dr Green has suggested injections to the trochanter and psoas. He remains active, and hopes that he can make progress with injections, as he's been doing home PT." CABR 589 & 111.

In addition to the HPI, which shows his condition is **not stable**, the record indicates that Mr. Boyd underwent a hip injection at this visit. More specifically, he received an injection into the trochanteric bursa. CABR 590 & 112. Moreover, the record has a section for the assessment and plan, and in this section it **directs Mr. Boyd to take further action**, that is, to continue home PT and to **follow up in four to six weeks** to consider psoas vsintra-articular injection if he is not improving. *Id.*

In late-inning tactics, the SIE obtained Declarations from Dr. Green Dr. Roa that the SIE provided to the Board with its "Supplement" to the SIE's Motion for Summary Judgment. These Monday-morning quarterback doctor Declarations were not before the SIE or Department when Dr. Roa submitted his protest record to the Third Party Claims Administrator in February, 2014. In fact, they were not even signed until February 23 and

February 24, **2015.** Late-inning ex parte gathering of Declarations, signed **roughly one year after** the Department obtained the protest record, are irrelevant as to how the protest is considered at the time the protest is filed. In its significant decision *In Re: Santos Alonzo,* the Board stated:

> "It has long been our understanding of the law of this state, as well as the administrative policy of the Board, that a "protest or request for reconsideration" filed with the Department in response to the admonitory language in the order **automatically operates** to set aside the Department's order and hold in abeyance the final adjudication of the matter until the Department officially acts to issue its final decision by a "further appealable order." [bold emphasis added]. *In Re: Santos Alonzo, BIIA number 56,833 & 56,833A (1981).*

See also the significant decision of In Re: John a. Robinson, BIIA number 59,454 & 59, 454A (1982). In its significant decision of *In Re: Mike Lambert,* the Board stated that, "It is sufficient if the Department **receives a written document, filed within the time allowed by law, which is reasonably calculated to put the Department on notice that the party submitting the document is requesting action inconsistent with the decision of the Department**. Upon **receipt** of the October 4, 1990 letter, June Gorsky knew, or should have known, that the claimant was disputing the Department's right to share in his third party recovery and was thereby aggrieved by the order of September 7, 1990." [bold emphasis added]. *In Re: Mike Lambert, BIIA number 91 0107 (1991).*

The document for consideration is the February 13, 2014 protest record of Dr. Roa. That is the document sent to the Third Party Claims Administrator. The late-inning Declarations produced by SIE counsel were submitted well after the sixty (60) day protest-deadline. Those Declarations were obtained roughly one year after the protest was received by the Third Party Administrator, and they are therefore irrelevant.

When the Dr. Roa protest record was presented to the Third Party Claims Administrator after the February 18, 2014 claim-closure order, it either was, or should have been, evident that Dr. Roa was requesting — and had performed – action that was inconsistent with the Department's order that Mr. Boyd was stable. He was not stable. In fact, he received an injection and the record indicates the need for further home physical therapy, and it indicates there is to be a follow up visit to consider another injection if his condition does not improve.

At a minimum, this protest record **was reasonably calculated** to put the SIE on notice that Dr. Roa was requesting action inconsistent with the decision of the Department.

The Board ruled that the Dr. Roa protest record did not "make any reference to an industrial injury." CABR 6. However, in its significant decision of *In Re: Mike Lambert*, the Board stated that "The use of "magical"

statutory words is **not required**." [bold emphasis added]. *In Re: Mike Lambert, BIIA Number 91 0107 (1991).* What is required -- and mandated by our State Supreme Court – is that the Industrial Insurance Act be **liberally construed** in order to achieve its purpose of providing compensation to all covered employees injured in their employment, **with doubts resolved in favor of the worker.** *See Michaels v. CH2M Hill, Inc., supra; and Dennis v. Dep't of Labor & Indus.,* 109 Wash.2d 467, 745 P.2d 1295 (1987).

Dr. Roa's protest record of February 13, 2014 specifically identifies Mr. Boyd's chief complaint: "CC: **Ongoing** L hip. referral by Dr. Green".[bold emphasis added]. CABR 588 & 110. After where the record indicates the date of the visit, it states: "**Occupational** Health." [bold emphasis added]. CABR 588 & 110. It bears noting that the Insurer Activity Prescription Form dated January 12, 2010 (using acronyms OTJI for "on the job injury" and LBP for "low back pain") states in part[1]:

> "**OTJI caused** recurrent LBP and **left hip region pain**." [bold emphasis added]. CABR 118.

Mr. Boyd's May 14, 2010 record from South Sound Neurosurgery

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1 The Board erred when it excluded this record. The Superior Court erred when it affirmed the Board's Decision & Order. See Section F.

states in part[2]:

> "OTJI caused recurrent LBP and **left hip region pain**."[bold emphasis added]. CABR 71.

Mr. Boyd had left hip surgery on July 1, 2011[3]:

> "PREOPERATIVE DIAGNOSIS **Left CAM-type hip** impingement with degenerative labrum." [bold emphasis added]. CABR 73.
>
> "POSTOPERATIVE DIAGNOSIS **Left CAM-type hip** impingement with degenerative labrum, plus labral tear, synovitis, two small rtilaginous loose bodies."[bold emphasis added]. CABR 73.
>
> "PROCEDURE **Left hip** arthroscopic loose body removal, labral debridement, partial synovetcomy, and osteoplasty of femoral head-neck junction." [bold emphasis added]. CABR 73.

Mr. Boyd's October 25, 2011 UW Medical Center record provides in part[4]:

> "Richard Boyd is a 60-year-old fire fighter who had **left arthroscopic loose body removal, labral debridement, partial synovectomy and arthroplasty of the femoral head neck unction on 7/1/11.** He is back for routine followup. He has not had any re-injuries but he has redeveloped low back pain with lateral thigh and leg pain. **His hip** has been

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2 The Board erred when it excluded this record. The Superior Court erred when it affirmed the Board's Decision & Order. See Section F.

3 The Board erred when it excluded this record. The Superior Court erred when it affirmed the Board's Decision & Order. See Section F.

4 Board erred when it excluded this record. The Superior Court erred when it affirmed the Board's Decision & Order. See Section F.

> more sore on the lateral side. It is 5-6/10 dull constant ache that is present during activity, rest, and at night. He has not had any catching, locking or instability. He feels like **his hip** has stiffened up." [bold emphasis added]. CABR 75.

Mr. Boyd's January 26, 2012 UW Medical Center record provides in part[5]:

> "Richard Boyd is a 60-year-old firefighter who had **left arthroscopid hip surgery *including loose* body removal, labral debridement, partial synovectomny and an osteoplasty of the femoral head neck junction on 7/1/11.** He initially did pretty well but has **redeveloped pain that is a little complicated partially due to the fact that he has had a lot of overlapping back symptoms** and radicular type features to that. He has not had any repeat injuries, 5-6/10 anterior groin to the front of the knee pain with some additional pain that goes down the same area to the lateral shin and ankle. There is a separate somewhat lateral **pelvis pain that seems to come from his buttock and low back**. He has 5-6/10 dull ache. It is present with activity and rest at night. He has not had any catching, locking or instability but has noticed that his hip has had less range of motion, feels more stiff." [bold emphasis added]. CABR 77.

Dr. Sherfey, MD, the SIE's independent medical examiner, issued a report providing in pertinent part[6]:

> "**Left hip pain** due to aostabular labral tearing and exacerbation of preexisting impingement, **related to the October 22, 2009 claim, on a more probable than not basis.**" [bold emphasis added]. CABR 97.

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5 Board erred when it excluded this record. The Superior Court erred when it affirmed the Board's Decision & Order. See Section F.

6 Board erred when it excluded this record. The Superior Court erred when it affirmed the Board's Decision & Order. See Section F.

Mr. Boyd's September 24, 2013 Dept of Orthopaedic & Sports Medicine record provides in part:

> "**ASSESSMENT**
> 1. **Left** internal and external snapping **hip**.
> 2. **Status post left arthroscopic debridement and osteoplasty**.
> 3. Chronic low back pain with primarily right-sided lower extremity residual.
>
> **DISPOSITION**
> **I am sending Richard to see one of my partners for an ultrasound-guided injection** of both his psoas and his greater trochanteric bursa, and then, he is going to do physical therapy for stretching and strengthening of both his psoas and **hip** abductors, iliotibial band." [bold emphasis added]. CABR 79 & 475.

The Dr. Roa February 13, 2014 protest record specifically notes that Mr. Boyd is presenting for a follow up of left hip pain:

> "Richard Lee Boyd is a 63 year old male presenting today for **f/u L hip pain**. He had arthroscopic labraldebridement in early 2012, and last met me for a diagnostic hip injection. **He did get several months of benefit from the surgery, but the pain has since returned, maybe more severe than before.**" [bold emphasis added]. CABR 589.

Moreover, the protest record, under the section "Patient Active Problem List Diagnosis", refers to the prior July 1, 2011 left arthroscopic hip surgery that Mr. Boyd underwent:

> "Diagnosis.
> - JOINT PAIN-PELVIS
> - **left arthroscopic hip loose body removal, labral**

> **debridement, partial synovectomy and an osteoplasty of thefemoral [sic] head neck junction** on 7/1/11." [bold emphasis added]. CABR 589 & 111.

Dr. Roa sent this record to the Third Party Claims Administrator handling Mr. Boyd's industrial injury claim. CABR 6. Even the Nurse Case Management Progress Report #15, by the Medical Case Manager – the agent for the SIE – acknowledges as an accepted condition: "permanent aggravation of **left hip** degenerative joint disease, **left hip** labral tear.[7]" [bold emphasis added]. *See Appendix A.* Evidence Rule 801(d)(2) provides:

> "**(d) Statements Which Are Not Hearsay.** A statement is not hearsay if - -
>
> (2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual **or a representative capacity** or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a **person authorized by the party to make a statement** concerning the subject, or (iv) a **statement by the party's agent** or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." [bold emphasis added].

Moreover, various CR 36 Requests for Admission were propounded to the SIE that are relevant in this case, and the SIE's non-answers should be

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7 This document is part of the Department's claim file. Mr. Boyd's Response to the SIE's Motion for Summary Judgment specifically stated: "EVIDENCE RELIED UPON This motion si based on . . . the records of the SIE and the Department, . . ." CABR 460.

construed and deemed as admissions.

> "REQUEST FOR ADMISSION NO. 1: Admit that FF Boyd (firefighter Boyd) met with Dr. Keith Mayo on October 12, 2010 because of left hip pain. This was authorized treatment under the claim and paid for by the SIE." CABR 594.
>
> "REQUEST FOR ADMISSION NO. 3: Admit that FF Boyd (firefighter Boyd) on October 14, 2010, received a left hip injection. This was authorized treatment under this claim and paid for by the SIE." CABR 595.
>
> "REQUEST FOR ADMISSION NO. 4: Admit that FF Boyd (firefighter Boyd) on October 21, 2010, received a left hip injection. FF Boyd (firefighter Boyd) reported pain relief after the procedure. This was authorized treatment under this claim and paid for by the SIE." CABR 595.
>
> "REQUEST FOR ADMISSION NO. 5: Admit that FF Boyd (firefighter Boyd) on October 28, 2010, received a left hip injection. This was authorized treatment under this claim and paid for by the SIE." CABR 596.
>
> "REQUEST FOR ADMISSION NO. 14: Admit that FF Boyd underwent a left hip injection/triamcinolone acetonide injection by Ashwin Roa, MD at the UW Bone and Joint Center on February 21, 2012 that was **paid for by the SIE** under this claim." [bold emphasis added]. CABR 599.
>
> "REQUEST FOR ADMISSION NO. 15: Admit that FF Boyd underwent a left hip injection/triamcinoione acetonide injection by Ashwin Roa, MD at the UW Bone and Joint Center on February 21, 2012 that was **authorized treatment by the SIE** under this claim." [bold emphasis added]. CABR 599.

These RFAs are clearly relevant, especially since the SIE is arguing that Dr. Roa's February 13, 2014 protest record about Mr. Boyd's left hip was not a

protest because it was not relating to a "covered condition." Nonetheless, the SIE answered each of those requests as follows:

> *"Objection: outside the scope of discovery. The request seeks to elicit information that is not relevant to the case, as defined by CR 26(b)(1). The sole issue before the Board is whether there was a timely protest to the Department order issued on February 18, 2014."* CABR 594, 595, 595, 596, 599, respectively.

This blanket objection is non-responsive. The admissions sought related to a hip condition that was not stable. Mr. Boyd requests that this Court deem all non-responsive RFA responses by the SIE admitted. CR 36(a) provides in part:

> "The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If **the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted** or that an amended answer be served." [bold emphasis added]. CR 36(a).

Clearly, if the SIE is authorizing and paying for treatment to Mr. Boyd's left hip on this claim, that would indicate SIE acknowledging causation between the workplace injury and the left hip. The SIE should be held to *their own statement* set forth in their Trial Brief where, on a different issue, SIE counsel stated: "The issue of proximate cause is a legitimate issue **on the issue of the purported protest** even though it is also an issue on the underlying merits of the plaintiff's claim." [bold emphasis added] CP 83. If

the SIE is authorizing and paying for treatment to Mr. Boyd's left hip, that would undercut any argument by the SIE that Dr. Roa's protest record – relating to left hip treatment – is not a covered condition. The SIE's non-responses to Mr. Boyd's Requests for Admission should be deemed admitted.

This protest record, which sought action inconsistent with the Department's February 18, 2014 order, was a timely protest. However, the Board and Superior Court **narrowly construed** the Industrial Insurance Act, resolved their doubt in favor of the SIE rather than the injured worker, and erred in granting the SIE's motion for summary judgment and denying Mr. Boyd's Motion for Summary Judgment.

D. Judicial Estoppel

The SIE should be judicially estopped from challenging Dr. Roa's February 13, 2014 record as a protest record. The SIE should also be judicially estopped from any argument that Mr. Boyd's treating doctor – Dr. Roa – did not have authority to protest by claiming that he was not the "attending physician" or not a proper party.

Through their counsel, the SIE submitted to the Claims Adjudicator Trisha Green, a September 24, 2013 **chart note** by one of Mr. Boyd's treating doctors, **Dr. Green**. CABR 84-85. It bears noting that at the Superior Court level, the SIE's Trial Brief states in pertinent part: "In this case, the

"attending physician" of record (the AP) was **Michael Lee, M.D."** [bold emphasis added]. CP 89. Third Party Claims Administrator Carrie Fleishmann testified by Declaration that "The attending physician of record listed in the January 27, 2014 closure order was **Michael Lee, M.D."** [bold emphasis added]. CABR 370.

The January 2, 2014 cover letter by SIE counsel that accompanied the Dr. Green chart note stated in pertinent part:

> "Please see the enclosed chart note by Dr. Green regarding Claimant's hip in which **Dr. Green recommends another IME and further treatment.** The self-insured employer received this chart note on October 31, 2013, which was within sixty days of the October 10, 2013 closing order. **I understand this chart note will likely be construed as a protest to the closing order**. Please contact me if you have any questions." [bold emphasis added]. CABR 84.

In a subsequent letter from the SIE counsel to Claims Adjudicator Trisha Green, counsel stated, "Claimant's hip surgeon, **Dr. Green, recently authored a chart note** which recommended another IME to address discrepancies in medical opinions for this claim. **That chart note served as a protest** to the October 10, 2012 closing order." [bold emphasis added]. CABR 87.

The SIE, in support of its Motion for Summary Judgment at the Board, produced an Affidavit of Carrie Fleischman, who identified herself as a Senior Integrated Claims Examiner with Matrix Absence Management, Inc..

CABR 352. Third Party Administrator Fleischman indicated in her Affidavit that she received a **chart note by John Green III, M.D.**, dated September 24, 2013, that the chart note indicated that Mr. Boyd would be referred for an injection and physical therapy, and that the **October 10, 2013 closure order was held in abeyance**. CABR 352.

While the Dr. Green chart note mentioned Mr. Boyd's L&I claim, the chart note did not identify Mr. Boyd's L&I claim number, did not identify a claims manager or claims adjudicator, did not identify or even refer to any Department order, and did not state that it was a protest. CABR 84.

In the SIE's Motion for Summary Judgment, SIE counsel states: "That said, Dr. Green did recommend an IME and a referral for an injection. **It was felt that this chart note could constitute a protest to the October 10, 2013 Department order** closing the claim with a Category IV PPD award as it was received after the order was issued. **Therefore, the closing order was held in abeyance and efforts were made to fully investigate whether Dr. Green was recommending further treatment under the claim or outside of the claim.**" CABR 348. Clearly, this illustrates that the SIE felt that Dr. Green – a treating provider – could protest a Department order in this claim. What's more, the SIE, through counsel, sent the treating provider's chart note *to the Department's Claims Adjudicator* with a letter stating SIE counsel's

understanding that the chart note ". . . will likely be construed as a protest to the closing order."

The SIE should be judicially estopped from taking a position that Mr. Boyd's treating doctor, Dr. Roa's chart note is not a protest and that Dr. Roa is not authorized to protest a Department order.

> "Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Bartley–Williams v. Kendall,* 134 Wash.App. 95, 98, 138 P.3d 1103 (2006). The doctrine seeks " 'to preserve respect for judicial proceedings,' " and " 'to avoid inconsistency, duplicity, and ... waste of time.' " *Cunningham v. Reliable Concrete Pumping, Inc.,* 126 Wash.App. 222, 225, 108 P.3d 147 (2005) (alteration in original) (internal quotation marks omitted) (quoting *Johnson v. Si–Cor, Inc.,* 107 Wash.App. 902, 906, 28 P.3d 832 (2001))."

Arkison v. Ethan Allen, Inc., 160 Wash. 2d 535, 538, 160 P.3d 13 (2007).

> "Three core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine: (1) whether "a party's later position" is " 'clearly inconsistent' with its earlier position"; (2) whether "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled' "; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine,* 532 U.S. 742, 750–51, 121 S.C. 1808, 149 LED.2d 968 (2001) (quoting *Edwards v. Aetna Life Ins. Co.,* 690 F.2d 595, 599 (6th Cir.1982)). These factors are not an "exhaustive formula" and "[additional considerations" may guide a court's decision."

Id. at 538–39. Here, a position by the SIE that Dr. Roa's chart note is not a

protest or that he is not authorized to protest is clearly inconsistent with earlier action by the SIE where its counsel submitted *Dr. Green's* chart note to the Claims Adjudicator and stated that "I understand this chart note will likely be construed as a protest to the closing order." If not estopped, the SIE imposes an unfair detriment to Mr. Boyd, because the SIE would attempt to bolster its defense of this appeal (i.e. argue that Dr. Roa's record is not a protest and that he is not an attending physician and therefore cannot protest), despite seeming to take the opposite position earlier in this Industrial Injury claim with respect to Dr. Green. Should the Court accept the SIE's inconsistent position, it would create the perception that the SIE is misleading this Court. The prior position taken by the SIE in this Industrial Injury claim runs contrary to an argument to this Court that attempts to invalidate Dr. Roa's protest record as a protest and Dr. Roa's authority to protest the Department's order.

E. Dr. Roa's February 13, 2014 protest record automatically operates to set aside the Department's order affirming claim closure until the Department officially acts to issue a final decision by a further appealable order. Mr. Boyd's Notice of Appeal, therefore, was not untimely and <u>the matter is still before the Department</u>.

In its significant decision *In Re: Santos Alonzo,* the Board stated:

> "It has long been our understanding of the law of this state, as well as the administrative policy of the Board, that a "protest or request for reconsideration" filed with the Department in response to the

admonitory language in the order **automatically operates to set aside the Department's order and hold in abeyance the final adjudication of the matter until the Department officially acts to issue its final decision by a "<u>further</u> appealable order."**"

[bold emphasis added]. *In Re: Santos Alonzo, BIIA number 56,833 & 56.833A (1981). See also In Re: John a. Robinson, BIIA number 59,454 & 59, 454A (1982).*

> "RCW 51.52.060 authorizes the Department to direct the submission of further evidence or the investigation of any further fact during the time limited for filing a notice of appeal, which action will effectively toll the appeal filing period. In addition, that same section authorizes the Department "within the time limited for appeal" to "Modify, reverse or change any order, decision, or award, or may hold any such order . . . in abeyance . . . pending further investigation."
>
> We feel the promise of the Department in its Order and Notice that a further appealable order will follow a request for reconsideration is a statement of legal responsibility. We hold that it is an enforceable right available to an aggrieved party to require the Department to act within the authority granted to it in RCW 51.52.060 to modify or at least hold in abeyance its prior action. It seems abundantly clear that the employer herein was attempting to exercise that right in submitting its protest letter (Exhibit No. 1). In fact, employer's counsel admits that he felt the Board was lacking jurisdiction in that the Department had not yet entered its final order and the matter in counsel's words was "still before the Department." We agree." *In Re: Santos Alonzo, BIIA number 56, 833 & 56, 833A (1981).*

Because the Department's order was timely protested, the notice of appeal deadline relied upon by the Board and Superior Court was erroneous. The Department's February 18, 2014 order should have been set aside based on

the valid and timely protest of Dr. Roa's protest record. The Board, in its significant decision of *In Re: Tonga G .Petersen*, stated:

> "Once the Department has exercised its authority to hold a prior order in abeyance, **it may not reverse the abeyance order and attempt to avoid its responsibility to issue a further order.** Orders of the Department become final and binding on the parties if not protested or appealed within 60 days of communication of the orders. RCW 51.52.050; *Marley*, 125 Wn.2d, at 538. Once the Department has held an order in abeyance, whether on its own motion as authorized by statute or in response to a timely protest and request for reconsideration, **that order can no longer become final and binding and it is not necessary for any party to file a further protest or an appeal.**" [bold emphasis added].

In Re: Tonga G. Petersen, BIIA number 12 10440 (2012). The February 18, 2014 Department order should have been held in abeyance. The Industrial Appeals Judge and the Board lacks jurisdiction. There was no appeal deadline, and Mr. Boyd's appeal was neither required nor "late." The Board and Superior Court erred when deciding that Mr. Boyd did not timely appeal the Department's order.

F. The Board and Superior Court erred when they failed to consider the treatment records in the Department's file.

In this case, Mr. Boyd presented to the Board in its Petition for Review, various records contained in the Department's claim file – specifically, records identified by Mr. Boyd's counsel as Exhibits A, B, C, D, E, F, C, H, I, J, K, L, M, N, O and P. CABR 67-118. The Board incorrectly chose to

view Mr. Boyd's Petition for Review "partly as a motion to reopen the record for newly discovered evidence", and the **Board** excluded Exhibits A,B,C,D,I,O and P. CABR 4 & 5. Exhibits A, B, C, D, I, O and P, are as follows:

Exhibit A: Section of South Sound Neurosurgery May 14, 2010 chart note. CABR 139.

Exhibit B: Page one of the July 1, 2011 Operative Report from Dr. Green. CABR 141.

Exhibit C: Page one of the October 25, 2011 Dr. Green chart note. CABR 143.

Exhibit D: Page one of the January 26, 2012 Dr. Green chart note. CABR 145.

Exhibit I: June 7, 2013 IME report of Justin Sherfey, M.D. CABR 161-166.

Exhibit O: November 15, 2013 claim review record of Carrie Fleischman. CABR 184.

Exhibit P: January 8, 2010 Activity Prescription Form (APF). CABR 186.

The Board erred in excluding Exhibits A,B,C,D,I,O and P. Distinct from the Industrial Appeals Judge, the "Board" consists of three members appointed by the governor. "There shall be a "board of industrial insurance

appeals," hereinafter called the "board," consisting of three members appointed by the governor, with the advice and consent of the senate, as hereinafter provided." RCW 51.52.010.

> "At the time and place fixed for hearing each party shall present all his or her evidence with respect to the issues raised in the notice of appeal, and if any party fails so to do, **the board** may determine the issues upon such evidence as may be presented **to it** at said hearing, . . ." [bold emphasis added]. RCW 51.52.102

Citing in part RCW 51.52.100, the Appellate Court in *Watt v. Weyerhaeuser Co.* recognized that a **hearing** is a trial de novo on sworn testimony. *Watt v. Weyerhaeuser Co.*, 18 Wash. App. 731, 739, 573 P.2d 1320, 1324–25 (1977). The *Board* hears appeals de novo.

"The Board hears appeals de novo, "reviewing the specific Department action" from which the parties appealed. *Kingery*, 132 Wash.2d at 171, 937 P.2d 565." *Matthews v. State Dep't of Labor & Indus.*, 171 Wash. App. 477, 491, 288 P.3d 630, 637 (2012).

The **Board** should have considered the evidence **presented to it**, and not excluded Exhibits A,B,C,D,I,O and P.

Moreover, Exhibits A,B,C,D,I,O and P were part of the Department's claim file. Mr. Boyd's Response to the SIE's Motion for Summary Judgment specifically stated:

"EVIDENCE RELIED UPON

> This motion is based on . . . the records of the SIE and the Department, . . ."

CABR 460. Accordingly, these documents (subsequently referred to in the Petition for Review as Exhibits A,B,D,D,I,O and P) were part of what formed the basis for Mr. Boyd's response to the SIE's Motion for Summary Judgment. The Board's ruling that these documents were not "made part of the Board's record in connection with the parties' respective motions for summary judgment" was error.

The Board and Superior Court erred in failing to consider these documents. Many of these documents are further discussed in section C, above.

G. Attorney fees and costs.

RCW 51.52.120(2) provides in pertinent part:

> "If, on appeal to the board, the order, decision, or award of the department is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained by the board, the board shall fix a reasonable fee for the services of his or her attorney in proceedings before the board if written application therefor is made by the attorney, worker, or beneficiary within one year from the date the final decision and order of the board is communicated to the party making the application."

RCW 51.52.130 (1) provides in pertinent part:

> "If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, **a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. In fixing the fee the court shall take into consideration the fee or fees, if any, fixed by the director and the board for such attorney's services before the department and the board.** If the court finds that the fee fixed by the director or by the board is inadequate for services performed before the department or board, or if the director or the board has fixed no fee for such services, then the court shall fix a fee for the attorney's services before the department, or the board, as the case may be, in addition to the fee fixed for the services in the court. If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer."

Mr. Boyd requests attorneys fees and costs incurred at all levels of appeal, including before the Board, the Superior Court and the Appellate Court. Because the Board did not allow the claim, Mr. Boyd should not have his benefits diminished due to attorney's fees and costs incurred before the Board and Court, even though the Board and Court did not rule in his favor, if on

appeal to an Appellate Court, the Appellate Court determines that the lower Court and Board were wrong.

> "The purpose behind the award of attorney fees in workers' compensation cases is to ensure adequate representation for injured workers who were denied justice by the Department:
>
> > The very purpose of allowing an attorney's fee in industrial accident cases primarily was designed to guarantee the injured workman adequate legal representation in presenting his claim on appeal without the incurring of legal expense or the diminution of his award if ultimately granted for the purpose of paying his counsel.
>
> *Harbor Plywood Corp. v. Department of Labor & Indus.*, 48 Wash.2d 553, 559, 295 P.2d 310 (1956) (quoting *Boeing Aircraft Co. v. Department of Labor & Indus.*, 26 Wash.2d 51, 173 P.2d 164, 167 (1946)); *Rehberger*, 154 Wash. at 662, 283 P. 185."

Brand v. Dep't of Labor & Indus. of State of Wash., 139 Wash. 2d 659, 667, 989 P.2d 1111 (1999), as amended on denial of reconsideration (Apr. 10, 2000), as amended (Apr. 17, 2000).

V. CONCLUSION

The February 13, 2014 Dr. Roa protest constitutes a protest of the Department's closure order. The Board and Superior Court failed to construe the Industrial Insurance Act liberally, and they resolved their doubt in favor of the self-insured-employer, rather than the injured worker. Because the Department order was timely protested, there was no "appeal deadline" of

that order until after the Department issues a final appealable order.

Firefighter Boyd is entitled to full benefits under the law, up to and including pension. The Board and Superior Court should be reversed. This case should be remanded back to the Department because the Board lacks jurisdiction.

DATED: September 26, 2016

RON MEYERS & ASSOCIATES PLLC

By: _____

Ron Meyers, WSBA No. 13169
Matthew G. Johnson, WSBA No. 27976
Tim Friedman, WSBA No. 37983
Attorneys for Appellant Boyd

Appendix A

Favorite Consultants Inc.
Medical Case Management

NURSE CASE MANAGEMENT
PROGRESS REPORT #15

CLAIMANT NAME:	**Richard L. Boyd**	**CLAIM #:**	**SC77017**
REFERRAL SOURCE:	**Carrie Fleischman** **Matrix Absence Management Inc.**	**INJURY DATE:**	**10/22/2009**
		REPORT DATE:	**8/15/2011**
DATE OF REFERRAL:	**4/1/2010**		
MED. CASE MGR:	**Daisy A. Lalas, RN, MN**	**EMPLOYER OF INJURY:**	**City Of Olympia**
ATTENDING PHYSICIAN:	**Michael Lee, M.D.**		

DEMOGRAPHICS

Age, weight, height	61 y/o, 5'9" tall, and weighs 172 lbs
Primary language	English
Education	college
Marital status	Married with two children
Dominant hand	Right handed

MEDICAL

Length of claim (date of injury, prior open/close)	1 year and 9 months
Accepted condition(s)	Lumbar spondylolisthesis, lumbar stenosis, permanent aggravation of left hip degenerative joint disease, left hip labral tear
Unaccepted (denied, post-related)	None
Pre-existing	Left hip degenerative joint disease
Description of the injury	Heavy lifting and pulling of a charge hose line up during a drill
Pain complaints	Spasm in low back and left hip pain with prolonged sitting and standing
Diagnostics (objective findings)	12/14/09 CT scan of the lumbar spine showed lower lumbar fusion from L3 through S1, orthopedic hardware in place. Accelerated lumbar intervertebral degenerative changes are more severe on the left side which has resulted in a scoliotic curve

	convex to the right at this level; L2-5 laminectomy; 4.5 mm of anterolisthesis to both L2 and L4. Left hip MRI showed CAM impingement with labral tear and likely chondromalacia of the acetabulum
Medications (which ones, long term usage, addiction concerns)	Aspirin Vicodin as needed for pain Clonazapam for muscle cramps
Most recent IME	none
Surgery(s) and complications	7/1/11 left hip arthroscopy with labral debridement and osteoplasty of the femoral head/neck junction. 7/3/10 removal of instrumentation L3 to S1 and posterior fusion of L2-3
Current treatment	Completed physical therapy status post 7/3/10 lumbar surgery Attending PT for left hip at St Peters Hospital
Permanent restrictions?	Unknown at this time
Identified barriers	Multiple surgeries, pre-existing medical condition

VOCATIONAL

JOI – job title, duties, physical demands	Firefighter at City of Olympia
Length of employment	2/1/84 – 1/2011
Employer – their belief about the injury; RTW options	Mr. Boyd voluntarily retired on January 31, 2011
Work history	Unknown
Worker's goal or belief	Mr. Boyd took a voluntary retirement on January 2011.

MEDICAL UPDATES

- On 8/11/11 This Medical Case Manager (MCM) met with Mr. Boyd and Dr. Green and his medical resident to review Mr. Boyd's progress with rehabilitation and vocational plan related to Mr. Boyd's left hip condition.
- Mr. Boyd is status post arthroscopic surgery of the left hip with labral debridement and osteoplasty of the femoral head/neck junction on 7/1/11.

- Mr. Boyd reports definite improvement in his left hip condition with resolution of pain and increased range of motion. He takes over the counter pain medication and/or Vicodin as needed for his low back pain. He attended two sessions of physical therapy and decided to do a home exercise program.
- Dr. Green advised Mr. Boyd to continue with the home exercise program. He does not have further treatment recommendations for Mr. Boyd. He indicated that Mr. Boyd can return to unrestricted work with regard to his left hip condition.
- Mr. Boyd is no longer receiving treatment with regard to his low back condition. He is 12 months status post removal of instrumentation L3 to S1 and posterior fusion of L2-3 (7/3/10) with Dr. Lee at UWMC.
- Mr. Boyd reports definite improvement status post redo of his lumbar fusion a year ago. He reports some residual symptoms despite all of the treatment that he has received for his low back. He reports leg cramps and some residual pain in his low back.
- Dr. Lee does not have further treatment recommendations for Mr. Boyd. He recommended a Physical Capacities Evaluation (PCE) to address Mr. Boyd's permanent restrictions related to his low back.
- Mr. Boyd is scheduled for a PCE on 9/7/11.

VOCATIONAL UPDATES

- Mr. Boyd worked as a firefighter for City of Olympia at the time of his industrial injury. He has taken voluntary retirement effective January 2011. He remains off work and receives time-loss compensation.
- Mr. Boyd wishes to return to gainful employment upon completion of the recommended treatment for his low back and left hip. He has been released to work with no restrictions with regard to his left hip condition.
- Mr. Boyd's vocational counselor, Omid Zargar, is assisting Mr. Boyd with his vocational plan/goal.

ACTION PLAN / RECOMMENDATIONS

1. Review the PCE report
2. Meet with Dr. Lee to review the PCE report of 9/7/11.
3. Address Mr. Boyd's questions and concerns on an as-needed basis.
4. Case planning with Mr. Boyd's employer of injury and vocational counselor.
5. Contact Mr. Boyd's claims manager to review the outcome of case activities and to develop active case management plan on 9/7/11, 9/20/11, and 9/30/11.

Respectfully Submitted,

Daisy A. Lalas

Daisy A. Lalas, RN, MN
Medical Case Manager

No. 48927-9-II

DIVISION II OF THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

RICHARD BOYD,

Appellant,

v.

CITY OF OLYMPIA, ET AL,

Respondent,

DECLARATION OF SERVICE OF APPELLANT'S OPENING BRIEF

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Matthew Johnson WSBA No. 27976
Tim Friedman WSBA No. 37983
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I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

DOCUMENTS:
1. Appellant's Opening Brief; and
2. This Declaration of Service.

ORIGINALS TO:
David C. Ponzoha, Court Clerk
Washington State Court of Appeals Division II

~~[✓]Via e-filing/email: coa2filings@courts.wa.gov~~

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DATED this 26th day of September, 2016, at Olympia, Washington.

Mindy Leach
Litigation Paralegal